

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Redevelopment of Spectrum to)
Encourage Innovation in the)
Use of New Telecommunications)
Technologies)

Federal Communications Commission
Office of the Secretary
ET Docket No. 92-9

To: The Commission

PETITION FOR CLARIFICATION

THE ASSOCIATION OF AMERICAN RAILROADS ("AAR"), by its attorneys, hereby requests that the Commission clarify its Notice of Proposed Rule Making, FCC 92-20, released February 7, 1992 ("NPRM"), in the above-captioned proceeding, concerning its transition plan to reaccommodate the current private fixed microwave licenses in the 1.85 to 2.20 GHz band.^{1/}

I. BACKGROUND

The Commission, in its NPRM, proposes to reallocate 220 MHz of the spectrum between 1.85 and 2.20 GHz (hereinafter "2 GHz"), for emerging telecommunications technologies. Portions of the 2 GHz band targeted for reallocation are currently used for private fixed microwave operations by railroads, electric utilities, petroleum and natural gas companies and local governments. NPRM at ¶ 15.

The Commission, recognizing that the proposed reallocation will entail significant costs to existing users, underscored its

^{1/} A summary of the NPRM was published in the Federal Register on February 19, 1992. 57 F.R. 5993. This Petition is being filed within 30 days of public notice. See 47 C.F.R. § 1.4(b)(1).

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intention "to reaccommodate the 2 GHz licensees in a manner that is the most advantageous for these existing users, least disruptive to the public and the most conducive to the introduction of new services." Id. at ¶ 22. As part of its transition plan, the Commission proposed that applications for new microwave facilities in the 2 GHz band be granted on a secondary basis only.^{2/} Specifically, the Commission stated as follows at Paragraph 23 of the NPRM:

First, we wish to ensure the availability of the existing vacant 2 GHz spectrum for the initial development of new services and to discourage possible speculative fixed service applications for this spectrum. We therefore will continue to grant applications for fixed operations in the proposed new technologies bands; however, applications for new facilities submitted after the adoption date of this Notice will be granted on a secondary basis only, conditioned upon the outcome of this proceeding.* This will provide some accommodation for the needs of fixed microwave users, particularly in less congested areas.

* We request comment on the appropriateness of this "cut-off" date.

AAR requests that the Commission clarify the above paragraph and address its effect on the private fixed microwave licensees, which use microwave facilities in the 2 GHz band to control vital railroad, electric, gas, and petroleum systems, as well as police, fire and emergency services. One interpretation of this paragraph is that the Commission has set forth a proposal for a future transition plan, on which the Commission is now seeking

^{2/} The Utilities Telecommunications Council ("UTC"), has requested the Private Radio Bureau to clarify the "secondary-only" policy for applications for new facilities and major modifications. See Letter to Ralph A. Haller, Chief, Private Radio Bureau, from Jeffrey L. Sheldon, General Counsel, UTC, dated February 27, 1992.

comment for implementation upon the conclusion of this proceeding.

However, another interpretation of Paragraph 23 is that the Commission has already changed its present application processing rules retroactive to January 16, 1992, the date that the Commission adopted the NPRM, and will be granting applications for new microwave facilities on a secondary basis. Under this interpretation, only the "cut-off" date is subject to comment, rather than the overall proposal to grant applications for new microwave facilities in the 2 GHz band on a secondary basis. As AAR will show, such an interpretation would be inconsistent with the Commission's goal of reaccommodating the 2 GHz licensees in a manner that is most advantageous to them. See id. at ¶ 22.

If the Commission were to process new applications for microwave facilities in the 2 GHz band on a secondary basis, there could be an adverse impact of substantial proportions on the railroad industry and other users of private microwave systems, including electric utilities, gas and petroleum companies and local governments.^{3/}

3/ In the event the Commission were to clarify Paragraph 23 as requiring that applications for new facilities in the 2 GHz band filed after January 16, 1992, be granted on a secondary basis, contingent on the outcome of this proceeding, AAR hereby requests that its Petition be considered as requesting reconsideration based on the Commission's failure to provide adequate notice and an opportunity to comment, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

A rule change of this magnitude is more than a general statement of procedure or policy, which is exempt from the notice and comment requirements of Section 553 of the APA. If the Commission's transition plan were to be implemented immediately and with retroactive effect, licensees in the 2 GHz band, which have relied on their primary status and
(continued...)

II. DISCUSSION

There is an immediate need for clarification of Paragraph 23 of the NPRM with respect to current 2 GHz microwave users. Uncertainty as to the interpretation of the Commission's intent is discouraging the filing of applications for supplemental microwave links in existing networks and for major modifications to existing facilities for purposes of routine upgrading, replacement and expansion of the parties' microwave facilities. Until Paragraph 23 is clarified, prospective applicants are reluctant to risk having new or modified microwave facilities licensed on a secondary basis.

Users of the 2 GHz band, such as the railroads, electric utilities, petroleum and gas companies and local governments, require uninterrupted and reliable communications -- they cannot tolerate interference which would imperil the reliability and safety of the underlying operations which are supported and controlled by their 2 GHz fixed microwave systems.^{4/}

The impact of secondary status on licensees in the railroad industry would be particularly disruptive. If new microwave facilities were to be licensed on a secondary basis (i.e.,

3/ (...continued)

ability to provide interference-free communications, would be substantially and adversely affected. At minimum, the public must be provided notice of the rule and an opportunity to comment.

4/ In amending Part 94 of the Commission's Rules, the Commission emphasized the importance of reliable communications systems to private microwave system operators. Operational Fixed Microwave Service (Private Carrier Operations), 57 RR 2d 1486, 1501 (1985). For example, the Commission noted that power companies demand a reliability factor of 99.995 percent, which is higher than the level of reliability for most common carrier services.

subject to interference), critical functions of railroad operations (e.g., dispatching, signal control and equipment defect detection) could be compromised. Accordingly, AAR requests that the Commission clarify this important aspect of its NPRM and address the effect of secondary status on 2 GHz microwave licensees.

Similarly, AAR requests that the Commission address the applicability of its policy to "substantial changes" in the facilities of authorized stations, which are treated as new applications under Section 1.962 of the Commission's Rules.^{5/} There would be a substantial impact on licensees if such changes to existing operations were also granted on a secondary basis.

One of the goals of the Commission's proposed transition plan is "to discourage possible speculative fixed service applications" for existing vacant 2 GHz spectrum. Id. at ¶ 23. This goal would not be achieved by the adoption of processing procedures which would relegate all users, including those with a legitimate need to routinely modify and upgrade their existing

^{5/} Pursuant to Section 1.962(c) of the Commission's Rules, a substantial change includes:

- (1) Any addition or change in frequency (except deletion of a frequency);
- (2) Any change in antenna azimuth;
- (3) Any change in antenna beam width;
- (4) Any change in antenna location greater than 5 seconds;
- (5) Any change in antenna location of less than 5 seconds but also involving a requirement for special aeronautical study;
- (6) Any change in emission;
- (7) Any increase in antenna height;
- (8) Any increase in authorized power in excess of a 2 to 1 ratio;
- (9) Any increase in emission bandwidth.

systems, to secondary status based on the potential of abuse by some.


As part of this rulemaking proceeding, the Commission should establish rules to prevent true speculation -- but it should not impose undue burdens on legitimate licensees with bona fide requirements to upgrade and expand existing systems to meet operational needs.

III. CONCLUSION

WHEREFORE, IN VIEW OF THE FOREGOING, AAR respectfully requests the Commission to clarify its NPRM with respect to the issues raised above, or in the alternative, to grant reconsideration of the processing rules with respect to new applications for microwave facilities in the existing 2 GHz band.

Respectfully submitted,

**THE ASSOCIATION OF AMERICAN
RAILROADS**

By 
Thomas J. Keller
Erwin G. Krasnow

VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6060

March 20, 1992

Its Attorneys

CERTIFICATE OF SERVICE

I, Jaime Y.W. Bierds, a secretary for the law firm Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, do hereby certify that a true and correct copy of the foregoing "Petition for Clarification" was delivered by hand, this 20th day of March, 1992, to the following:

Chairman Alfred C. Sikes
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Sherrie P. Marshall
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Andrew D. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Ralph Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Dr. Thomas P. Stanley, Chief
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Dr. Bruce A. Franca, Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

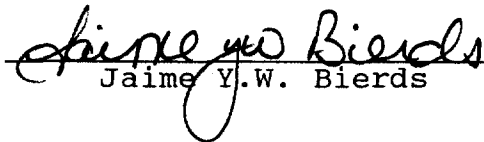
Will McGibbon, Chief
Spectrum Engineering Division
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

William Torak, Deputy Chief
Spectrum Engineering Division
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

David Siddall, Chief
Frequency Allocation Branch
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7102
Washington, D.C. 20554

H. Franklin Wright, Chief
Frequency Liaison Branch
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7322
Washington, D.C. 20554

Thomas Mooring
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7330
Washington, D.C. 20554


Jaime Y.W. Bierds